

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LINDA SUSAN KYTE
:
:
v. : Civil Action No. DKC 2003-2558
Exempt from ECF
:
COLLEGE OF SOUTHERN MARYLAND
:

MEMORANDUM OPINION

Presently pending and ready for resolution is the motion by Plaintiff, Linda Susan Kyte, to withdraw her claims against College of Southern Maryland, Defendant. Because of the late stage of the proceedings, Defendant, while not objecting to dismissal of the claims, seeks some protection from having to face a renewed action if Plaintiff changes her mind at some later date. Specifically, Defendant seeks either dismissal with prejudice or a ruling that any refiled case will be conditioned on the payment of costs of this action, including attorney's fees. The issues are briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the following reasons, Plaintiff's request to withdraw her claims without prejudice will be granted, although any refiling of the claims will be subject to Rule 41(d).

After a defendant has answered a complaint, "an action shall not be dismissed at the plaintiff's instance save upon order of

the court and upon such terms and conditions as the court deems proper." Fed.R.Civ.P. 41(a)(2). As a general rule, a "plaintiff's motion for voluntary dismissal without prejudice under Rule 41(a)(2) should not be denied absent substantial prejudice to the defendant." *Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986). A district court, however, may dismiss an action under Rule 41(a)(2) with prejudice, see *Choice Hotels Int'l Inc. v. Goodwin and Boone*, 11 F.3d 469, 471 (4th Cir. 1993), at least as long as the plaintiff has adequate notice that dismissal with prejudice is contemplated. *Andes*, 788 F.2d at 1037 ("It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing *with* prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy."). Furthermore, a court may also condition a voluntary dismissal without prejudice on the payment of the nonmoving party's attorneys' fees and costs in the litigation under some circumstances, but such a condition is far from automatic. See *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987). Ordinarily those fees should be limited to work that could not be used again in a future suit. *Id.*

A non-exhaustive four factor list that a district court should consider in ruling on a Rule 41(a)(2) dismissal motion is

sometimes consulted. See *Dean v. WLR Foods, Inc.*, 204 F.R.D. 75, 77 (W.D. Va. 2001) (citing *Teck Gen. P'ship v. Crown Cent. Petroleum Corp.*, 28 F.Supp.2d 989, 991 (E.D.Va. 1998)). The factors are: (1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, i.e., whether a dispositive motion is pending. *Dean*, 204 F.R.D. at 77; see also *Wilson v. Eli Lilly & Co.*, 222 F.R.D. 99, 100 (D.Md. 2004).

In addition to governing the dismissal of actions, Rule 41(d) also provides:

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Most courts that have considered the question determine that attorney's fees can be part of the contingency costs that must be paid if a new action is filed, particularly if those courts permit payment of attorney's fees to be a condition of dismissal without prejudice under Rule 41(a). See *Edward X. Clinton, Jr.*,

Does Rule 41(d) Authorize an Award of Attorney's Fees?, 71 St. John's L. Rev. 81 (Winter 1997).

It is, thus, important to note the stage of the litigation at which Plaintiff seeks to dismiss in order to assess any prejudice to Defendant and whether any attorney time would be wasted if the case were to be refiled. The original complaint was filed on September 4, 2003, an amended complaint was filed on January 7, 2004, and an answer was filed shortly thereafter. A scheduling order was entered, setting a discovery deadline of June 3, 2004 and a motions deadline of July 5. Status reports were due on June 3. Counsel stipulated to an extension of time to file expert disclosures, but otherwise the file reflects no activity. On June 9, the court requested counsel to file the overdue status reports, and, on June 23, counsel for Plaintiff reported a settlement in principle. Two months later, the court again requested a status report, prompting counsel for Plaintiff to file a motion for leave to withdraw. At that stage, the court referred the case to a magistrate judge for ADR. Plaintiff's pro se request for the appointment of counsel was denied and a settlement conference was set before Magistrate Judge Schulze. On October 26, the court granted counsel's motion to withdraw and directed the parties to complete

discovery within 60 days. On December 17, Plaintiff filed the motion to withdraw claims.

In its response to Plaintiff's motion, Defendant recites that limited written discovery was propounded by Defendant in April, but Plaintiff never answered; the parties engaged in settlement discussions from May to July, and reached a settlement in principle by June 23, 2004. Defense counsel prepared the draft documents which were sent to Plaintiff's counsel on July 23, 2004. Apparently, Plaintiff's counsel were unable to secure final consent and execution of the documents, and moved for leave to withdraw on August 20, 2004. After the settlement conference before Judge Schulze, and the court's order to complete discovery by December 27, Defendant served renewed written discovery requests on Plaintiff and noted Plaintiff's deposition for December 22, 2004. Plaintiff never responded to the written discovery, and, on December 16, Defendant's counsel sent a reminder letter to Plaintiff. On December 17, Plaintiff's request to withdraw her claims was filed.

Plaintiff's request to withdraw her claims recites that her family's health and her own mental and physical health continue to deteriorate and she no longer has the money to continue. In her reply to Defendant's opposition, she asserts that the

"agreement in principle" included a payment to her of \$10,000 in tax free dollars (which was less than she had spent on the case), and that the draft agreement she later saw did not have that provision, and had others that she found objectionable. She also asserts that she cannot find another attorney within Maryland to assist her, that some of her claims are not time barred, and that because she has already spent a good deal of money on the case, she should not have to pay Defendant's fees now or in the future.

It is not clear how much time was spent by counsel on the merits of the dispute, but it appears that both sides were initially content to explore settlement without conducting formal discovery. Other than potentially facing renewed litigation, Defendant points to no prejudice from dismissal at this time. Thus, there is no need to consider dismissal with prejudice. The only question is whether Plaintiff should, if she seeks to file again, have to pay Defendant's costs incurred in this case as a condition. Defendant has not substantiated that substantial attorney time was devoted to tasks that would not be useful in renewed litigation. Further, Rule 41(d) automatically makes payment of prior costs a possibility whenever a new suit is filed. See Fed.R.Civ.P. 41(d).

Accordingly, Plaintiff's request to dismiss this action without prejudice will be granted, but Plaintiff is advised that the provisions of Rule 41(d) might be invoked if the case is refiled in this court. A separate Order will be entered.

_____/s/
DEBORAH K. CHASANOW
United States District Judge

February 18, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LINDA SUSAN KYTE
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v. : Civil Action No. 2003-2558
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COLLEGE OF SOUTHERN MARYLAND
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ORDER

For the reasons stated in the foregoing Memorandum Opinion,
it is this 18th day of February, 2005, by the United States
District Court for the District of Maryland, ORDERED that:

1. Plaintiff's Motion to Withdraw All Claims (Paper 26) BE,
and the same hereby IS, GRANTED;

2. The complaint BE, and the same hereby IS, DISMISSED
without prejudice; and

3. The clerk will transmit copies of the Memorandum Opinion
and this Order to Plaintiff and to counsel for Defendant and
CLOSE this case.

_____/s/
DEBORAH K. CHASANOW
United States District Judge